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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 302–308) is reported at 305 F. 2d 172.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1962 (R. 309), and a petition for rehearing was denied on August 31, 1962 (R. 310). On October 11, 1962, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 30, 1962 (R. 311). The petition was filed on November 16, 1962,[1] and granted on

[1] The government in its brief in opposition raised no issue as to timeliness, since the late filing was apparently due to a misunderstanding between petitioner and prison authorities.

May 27, 1963 (R. 312; 373 U.S. 931). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The police of Newport, Kentucky, arrested petitioner and his co-defendants. Shortly thereafter, they conducted a search of the automobile in which the men were apprehended. The following facts were known to the police at the time of the arrest: that petitioners had been seated in a stationary automobile on a city street from 10:00 p.m. to 3:00 a.m.; that they offered an implausible explanation of their conduct; that they had no papers indicating ownership of the vehicle; and that one of them claimed that he had bought the automobile on the preceding day, although all of them acknowledged that they were unemployed. The following questions are presented:

1. Whether in the circumstances the search of the automobile (which showed that the men possessed loaded pistols and objects suitable for use in the commission of robbery) was unreasonable and therefore in violation of the Fourteenth Amendment.

2. Whether it was plain error to appoint two lawyers to represent three defendants jointly.[2]

STATUTES INVOLVED

Ordinance No. 1320 of the City of Newport, Kentucky, provides:

> SECTION 1. Loitering—Penalty: That it shall be unlawful for any person not having a legit-

[2] This question was not presented as an issue in the petition for a writ of certiorari.

imate business or visible means of support to, in an idle, dissolute, disreputable or loafing way, to loiter around the streets or within the limits of the City of Newport and any person so offending shall be, on conviction thereof, fined in any sum not exceeding fifteen dollars and costs.

Kentucky Revised Statutes § 436.520 provides in pertinent part:

> Vagrancy. (1) Any person guilty of being a vagrant shall, for the first offense, be fined ten dollars or imprisoned for thirty days, or both. For the second and each subsequent offiense, he shall be imprisoned for sixty days.
>
> (2) "Vagrant," as used in subsection (1) of of this section * * * means:
>
> (a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or
>
> (b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one, or
>
> * * * * *
>
> (d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city.

STATEMENT

Petitioner and two others were convicted in the United States District Court for the Eastern District of Kentucky of conspiring to rob a federally insured

state bank (R. 1–2, 295). Petitioner was sentenced to imprisonment for five years (R. 299).

The principal issue relates to the seizure from an automobile by Newport, Kentucky, police of objects suitable for use in the commission of robberies, including two loaded pistols, a mask, rope, and a false license plate with hooks which would allow it to be hung over another license plate. Petitioner and his co-defendants moved to suppress as evidence the objects seized from the automobile on the ground that they were "illegally obtained as a result of an unreasonable search and seizure, in violation of the constitutional rights of defendants" (R. 2–3). They argued they were "entitled to a judicial determination by the Commonwealth of Kentucky as to whether or not they were unlawfully or lawfully arrested and upon that determination hinges the question of whether this was or was not an unlawful search and seizure in violation of their Constitutional rights" (R. 168–170, 253). After a hearing (R. 7–26), and again at the close of the government's case and at the conclusion of the trial (R. 170–171, 254), the trial court denied the motion. It held that the state police officers who seized the objects had made a reasonable search.

The circumstances which the court found warranted the search were these: at 3:00 a.m., petitioner and his two companions were seated in a stationary automobile parked in a business section;[1] they had been there for five hours; they could give no reasonable explanation for their conduct; they gave "illogical or

[1] The fourth defendant charged in the indictment, who is a fugitive, was not in the automobile.

rather vague and irresponsible and suspicious reasons for why they were there present," and they did not possess the title papers to the automobile. These circumstances, the court found, justified the arrest for vagrancy and the resulting search (R. 26-27, 170-171, 254). The court of appeals affirmed (R. 302-308; 305 F. 2d 172). It rejected petitioner's argument, based upon Kentucky law, "that until the legality of the search is determined in the state courts, the evidence is not admissible in this type of prosecution" (Def. Br., Ct. App., p. 5).

The seized evidence was introduced at the trial by the government. Petitioner alone sought review in this Court. The evidence pertinent to the search and seizure may be summarized as follows:

On January 20, 1961, the Newport, Kentucky, police received a complaint at 3 a.m. that three men were acting "suspiciously" in a pale green 1955 Buick automobile at the northeastern corner of Tenth and Monmouth Street. They were told that the men had been parked there since 10 p.m. (R. 9, 19, 21-22, 40). Two police officers and two detectives were dispatched to investigate (R. 7, 34). The businesses located in the vicinity of the parked car included a filling station, a cigar store, a cafe, a dry cleaning plant, a butcher store, and a night club (R. 18). The officers found petitioner and two others in the automobile. The three men admitted that they had been "in the vicinity for sometime" (R. 9). When the officers asked why they were parked there, the occupants of the car gave a vague explanation for their presence (R. 35). Eventually one of them stated they

were waiting for a truck being driven by one Johnny Sexton from Lexington to Newport on Route 27 (R. 9–10, 14–15).* They were unable to specify the company for which Sexton worked, the type of truck that he was driving, or the expected time of his arrival (R. 9, 16).

The officers inquired as to the ownership of the Buick automobile. Sykes said that he had bought the car the previous day but he could not produce any papers evidencing ownership (R. 17, 22, 41). Sykes was asked how the truck driver could identify a newly purchased automobile. He responded that the truck driver usually stopped for coffee at a restaurant on the next corner. Sykes could give no explanation why his automobile was parked at a distance from the restaurant (R. 35). Upon questioning the occupants about their employment, the officers learned that they were unemployed (R. 16–17). Sykes also told the officers that he had been arrested once for breaking and entering a storehouse (R. 42). The officers considered the answers to their questions evasive (R. 16).

The three occupants were arrested for vagrancy and were found to have twenty-five cents among them (R. 16, 22). The automobile was driven by one of the officers to the police station, eight blocks away (R. 8, 12–13). The two uniformed police took the arrested men to the station in their police car (R. 13).

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*The distance from Lexington to Newport is less than 100 miles.

At the station, petitioner and his companions were "booked" on a vagrancy charge and required to give their personal effects to a police sergeant. Some fifteen minutes after they were brought to the station, Sykes requested permission to go to the car and get some cigarettes. Permission was refused but Detective Ciafardini and Officers Colston and Dotson went to the automobile. Ciafardini, who had the keys to the car, saw no cigarettes either on the seat or on the dashboard. He opened the unlocked glove compartment and found two loaded revolvers (R. 10, 15, 23–24, 35–36, 42–43, 60–61, 64). The officers then attempted to open the locked trunk of the car, but the key would not work (R. 15, 24, 44, 62, 64). They returned to the station and placed an additional charge of carrying concealed and deadly weapons against the defendants (R. 16–17, 23, 36, 52). Detective Ciafardini summoned Sykes for questioning and sent officer Dotson back to the automobile to examine its trunk. Dotson, with the assistance of a garage employee, obtained access to the trunk by removing the rear seat (R. 15, 24, 44, 61–62, 64, 66). Two pillow cases found in the trunk contained two knotted lady's stockings, one with mouth and eye holes and a band-aid for the nose; an illegally manufactured license plate for Mason County, Kentucky, with attached small hooks which permitted it to be hung over another license plate; four caps, two of which had been cut so that they could be pulled further down on the head; two pairs

of gloves; two pieces of rope and a length of fishing cord; five band-aids; and two shot-gun shells (R. 20, 36–37, 44–47, 62, 70).

SUMMARY OF ARGUMENT

I

The basic question in this case is whether the search conducted by state officers of the automobile in which the three defendants were arrested was reasonable under the Fourth Amendment. See *Elkins* v. *United States*, 364 U.S. 206; *Ker* v. *California*, 374 U.S. 23.

A. The search of the automobile was reasonable since the state officers could arrest the defendants for the misdemeanor of vagrancy being committed in their presence and could conduct a search incident to the arrests.

1. The record is not clear, because it was not an issue below, whether the arrests were made under authority of the Newport city ordinance or the Kentucky statute, or both. Since the burden of proof was on petitioners, the government can rely upon either provision. The conduct of petitioner and his companions, we submit, is covered by the ordinance which makes it an offense to loiter in an idle way around the streets without having a legitimate business or without visible means of support. Under Kentucky law, an arrest could properly be made by the officers for this violation since it was a public offense committed in their presence.

The Newport ordinance is not unconstitutionally vague. Similar laws have been repeatedly upheld

against that contention. In any event, this case does not involve the constitutionality of the ordinance. The issue, rather, is whether the police made an arbitrary invasion of privacy. Since, at the least, the ordinance is not patently unconstitutional, the police were not acting arbitrarily when they arrested the three defendants under it for offenses committed in their presence, whether or not a court might later uphold its constitutionality.

2. The search of the automobile, incident to the arrest for vagrancy, was proper. The vagrancy ordinance is intended to prevent persons from lying in wait on the city streets to commit other crimes. We suggest, therefore, though the point is not free from doubt, that the officers could reasonably search for contraband, fruits, and instrumentalities of crimes closely related to vagrancy—offenses such as robbery and assault—which this legislation was designed to prevent.

The search of the automobile at the police station, rather than the place where the car was parked, does not affect its validity. If there was a right to search, there was a right to search at a safe and suitable place. It was therefore reasonable for the arresting officers to conduct the search in a sheltered, lighted area without the necessity of watching three men on the street in the dark of a winter night.

B. 1. Assuming that the officers could not properly have made the arrest for vagrancy, the arrests may be sustained on the ground that the officers had information establishing probable cause for automobile theft. When arresting officers in fact have

probable cause to conclude that one crime is committed, the arrest does not become illegal because they arrest for a different offense. Just as a subjective belief of the officers that probable cause exists cannot justify an arrest where there is no objective probable cause, their subjective intent to arrest for one offense rather than another does not vitiate an arrest when there is probable cause to arrest for the latter.

2. There was probable cause to believe that the defendants had stolen an automobile. The state officers had been summoned at 3:00 a.m. because of apprehension arising from the fact that three men had been seated in an automobile for five hours in a business district. When asked to explain their conduct, the men gave the officers evasive answers. The officers ascertained that the men had no title papers to the automobile and apparently did not have the means to have recently purchased the automobile, as they claimed. Under all the circumstances, "a man of reasonable caution" (*Draper* v. *United States*, 358 U.S. 307, 313) could believe that the three occupants of the automobile had stolen it.

3. If the defendants could have been validly arrested for auto theft, the search of the automobile and seizure of the items found in it were valid. Arresting officers may seize, incident to an arrest, fruits of the crime, such as stolen property. Therefore, they could seize the automobile and subsequently move, inventory, and examine it.

C. Independent of the validity of the arrests, the officers could search and seize the automobile because they had probable cause to believe that it had been

stolen. It is well established that a vehicle may be searched without a warrant or previous arrest when officers have probable cause to believe that it contains contraband. *Carroll* v. *United States*, 267 U.S. 132. It follows that an automobile may likewise be seized and searched when the officers have probable cause to believe that the automobile itself is stolen.

II

Petitioner contends that the appointment of two lawyers to represent the three defendants was erroneous. Since petitioner did not raise this argument in the trial court or at any other time prior to his brief on the merits, he must show exceptional circumstances requiring this Court to rectify plain error. There is nothing inherently undesirable in one lawyer's representing multiple defendants as opposed to separate representation for each defendant. The choice is dependent upon trial strategy and the relationship between the defendants. In the absence of any hint that petitioner or his lawyers complained on this ground, there is no basis for concluding that he was improperly represented.

ARGUMENT

I

THE EVIDENCE WAS ADMISSIBLE SINCE THE SEARCH WAS REASONABLE UNDER THE FOURTEENTH AMENDMENT

Petitioner's principal contention is that the introduction at his federal trial of evidence found by police officers in the automobile was reversible error because the search was unconstitutional under the

Fourteenth Amendment.[5] This Court held in *Elkins* v. *United States*, 364 U.S. 206, 223, that the test for determining the admissibility, in a federal trial, of evidence obtained by state officials is whether, if the search had been conducted by federal officers, it "would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment * * *." The Court went on to state that "[i]n determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 224.

This test was not changed by *Mapp* v. *Ohio*, 367 U.S. 643, or *Ker* v. *California*, 374 U.S. 23. Those cases held that, when a search by state officers violated the Fourteenth Amendment, as judged by the standards applicable to federal officers under the Fourth Amendment, evidence seized could not be admitted at a state trial. In *Ker* the Court also stated (374 U.S. at 33–34):

> This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean

[5] Petitioner has raised no contention as to the sufficiency of the evidence in this Court. The Solicitor General has had some concern on this score but has concluded that the case against petitioner was sufficient to warrant its submission to the jury.

> application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. * * * The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.

Hence the constitutional standard—reasonableness—must be applied in the broad perspective of adjudication governing all law enforcement officers and all courts, federal and State, throughout the nation.

The situation confronting the arresting officers was that they had received a complaint that three men had been sitting in an automobile on a street from 10 p.m. to 3 p.m. When questioned by the police before their arrest, the men gave evasive and unlikely answers as to the reason for their presence. They said that they were waiting for a truck driver but could not say how they would recognize the truck or how the truck driver would recognize the automobile. They could not name the company for whom the driver worked, the kind of truck he was driving, or the expected time of arrival. While one of the occupants claimed that he had bought the automobile the previous day, he, like the

other two, admitted to being unemployed and he had no title papers.

The local police officers confronted with this situation believed an arrest and a search to be appropriate. The district court, which saw and heard the witnesses and was in all respects closer to the living events than a cold record can bring a reviewing court, found the search to be reasonable. The court of appeals affirmed after a full review. On the bare record the case is close but under all the circumstances the government urges that the findings of reasonableness should be affirmed. *First,* the officers had probable cause to believe that the defendants had violated a local "vagrancy" ordinance and therefore could arrest them for this offense. Incident to the arrest, we argue, they could search for instrumentalities and fruits of related offenses which they could reasonably believe the defendants had committed. *Second,* the arrests were valid because the officers had probable cause to believe that the defendants had stolen the automobile in which they were sitting. Incident to such arrest, they could seize and search the automobile as the fruit of the crime. *Third,* independent of the arrests, the officers had reasonable cause to believe the automobile had been stolen and could therefore search and seize it.

A. THE SEARCH WAS REASONABLE SINCE THE STATE OFFICERS COULD ARREST THE DEFENDANTS FOR THE MISDEMEANOR OF VAGRANCY BEING COMMITTED IN THEIR PRESENCE AND COULD SEARCH THE AUTOMOBILE INCIDENT TO THE ARRESTS

1. The officers could properly arrest the defendants under a Newport city ordinance for vagrancy

a. The three occupants of the automobile were ar-

rested and booked by officers of the Newport police for "vagrancy." The record is not clear, because the question was not in issue below, whether the arrest was made under a Kentucky statute or a Newport city ordinance. Since a charge of carrying concealed weapons was lodged fifteen minutes after the arrest, when the search uncovered weapons in the car, there was no occasion to show, at the preliminary hearing in the local court, whether one or both provisions had been relied upon by the arresting officers. Both the statute and the ordinance prohibit vagrancy. While the ordinance, unlike the statute, is labelled a loitering provision, it applies to loitering by "any person not having a legitimate business or visible means of support" (see pp. 2–3 above) and describes the kind of conduct embraced by the concept of vagrancy. See, *e.g.*, *State* v. *Grenz*, 26 Wash. 2d 764, 175 P. 2d 633; *Ex parte Strittmatter*, 58 Tex. Crim. Rep. 156, 124 S.W. 906; D.C. Code § 22–3302; Calif. Penal Code § 647; 3 Wharton, *Criminal Law and Procedure* (Anderson ed.), § 956, pp. 99–101. Indeed, two of the four subsections of the state vagrancy statute require, like the city ordinance, proof of loitering, as well as of lack of visible means of support, for conviction. Therefore the ordinance and the two subsections of the state statute cover essentially the same area and "vagrancy" is an apt description of both.

Since both the state statute and local ordinance prohibit vagrancy, we submit that the arrest was valid if the officers could properly have made the arrests under either provision. As we will show below (pp. 27–29), it is immaterial whether they had the state

statute or the ordinance in mind.* But, even if their subjective intent is deemed to be controlling here, the only evidence is consistent with an arrest for violation of both provisions. The burden of proof is on the one challenging the legality of a search and seizure to show that an illegal search and seizure has occurred. *Lotto* v. *United States*, 157 F. 2d 623, 626 (C.A. 8), certiorari denied, 330 U.S. 811; *Schnitzer* v. *United States*, 77 F. 2d 233, 235 (C.A. 8); cf. *Nardone* v. *United States*, 308 U.S. 338, 341. Petitioner having failed even to raise the issue (see R. 168–169), let alone present any evidence, as to the provision under which the arrests were made, has failed to sustain his burden of proving that the arrests were not under both provisions but were rather pursuant to one and not the other. Consequently, the arrests were valid if the officers had power to arrest under either provision.

The power of local police officers to make an arrest is determined by local law even in cases involving the federal constitutionality of a search. *Ker* v. *California*, 374 U.S. 23; *United States* v. *Di Re*, 332 U.S. 581. Under Kentucky law, a peace officer may arrest without a warrant when a public offense is committed in his presence or when he has reasonable grounds for believing that the person arrested has committed a felony. Kentucky Criminal Code of Practice, § 36 (now replaced by Ky. Rev. Stat. § 431.005). The term "public offenses" includes "any acts or omis-

* We show below that the arrest would be valid under the ordinance even if petitioner had shown that the subjective intent of the officers was to arrest under the state statute. It is sufficient that the officers had grounds to arrest regardless of the statute on which they happened to rely.

sions for which the law has prescribed a punishment" (*Stratton* v. *Commonwealth*, 263 S.W. 2d 99, 100 (Ky.); it is not limited to felonies. The arrest statute has been construed by the Kentucky Court of Appeals to authorize arrest if the officer acts in good faith and upon reasonable grounds to believe that a public offense is being committed in his presence. *Sizemore* v. *Hoskins*, 314 Ky. 436, 235 S.W. 2d 1011. While that belief must come to an officer through his senses, information received from the person arrested is considered as within the presence of the officer. In *Giannini* v. *Garland*, 296 Ky. 361, 367, 177 S.W. 2d 133, the court, in explaining most of the arrest cases cited by petitioner (Pet. Br. 26–27), said: "[A]n officer may arrest a misdemeanant without a warrant upon the ground that the offense was committed in his presence when he has 'reasonable grounds to believe, and did believe in good faith' that the person arrested was guilty, but the foundation for such reasonable belief must be based and deduced from facts obtained by the officer through some one or more of his senses and not from information he may have received from third parties. But information received from the person arrested is sufficient to complete the commission of the offense in the presence of the officer." See also *Davis* v. *Commonwealth*, 280 S.W. 2d 714 (Ky.).

The state statute (see p. 3 above) makes it a criminal offense if any person, without visible means of support, "habitually loiters or rambles about" and has no occupation, or "habitually fails to engage in honest labor for his own support or for the support of his family," or "habitually refuses to work, and * * *

habitually loiters on the streets or public places." The officers here knew that the three occupants of the automobile were loitering since they had been told that the men had been there for five hours late at night. The officers also knew that the men had no means of support or occupation since the men said that they were unemployed. However, they apparently had no indication that the men "habitually" loitered or "habitually" refused or failed to work. Consequently, we do not urge that the officers could reasonably believe that the state statute was being violated in their presence.[1]

But it does appear that the local officers had power under Kentucky law, and therefore consistently with the Fourth and Fourteenth Amendments, to arrest for violation of the city ordinance. The ordinance prohibits loitering in an idle way "around the streets or within the limits of the City of Newport" by "any person not having a legitimate business or visible means of support." The officers saw three men in a parked car on the streets of Newport at 3 a.m. The men admitted to the officers that they had been there for some time,[2] that they were unemployed, and that they had no title papers to the car. They gave an implausible explanation of why they were there. The

[1] In our brief in opposition to the petition for a writ of certiorari in this case, we indicated, without a detailed analysis of the evidence in relation to the state statute, that the officers did have probable cause to arrest under it. The respondent can of course make new arguments in support of the judgment in its favor below.

[2] The admission of the men that they had been present for some time was supported by the complaint made to the police that they had been there for five hours.

officers therefore had reasonable grounds, based on information obtained by their senses, to believe that the defendants were violating the ordinance in their presence. Cf. *State* v. *Grenz*, 26 Wash. 2d 764, 175 P. 2d 633; *People* v. *Bruno*, 211 Cal. App. 2d 855.[9]

b. Petitioner contends (Br. 34–41) that the arrests were invalid because the state vagrancy statute was unconstitutionally vague. In particular, he claims that the words "loiters" and "without visible means of support" do not indicate what is prohibited and what is not. Since these are likewise elements of the crime under the city ordinance, petitioner's argument as to vagueness is applicable to the ordinance as well.[10]

Petitioner's argument is that a prohibition against loitering by persons without visible means of support

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[9] Petitioner contends (Pet. Br. 30–32) that the defendants were not arrested for vagrancy despite the explicit testimony that they were arrested and booked for this crime (R. 15). He relies on the testimony of an arresting officer that the defendants "[w]ere up for no good" (R. 18) and the characterization by the courts below of the defendants' conduct as suspicious (R. 26, 170, 304). However, the ordinance prohibits only loitering "in an idle, dissolute, disreputable or loafing way." Thus, ordinary standing or sitting is not prohibited; loitering in a suspicious manner, on the other hand, satisfied this element of the crime.

[10] Petitioner also contends (Pet. Br. 40–41) that the state statute violates "the Eighth Amendment's ban on cruel and unusual punishment as made applicable through the Fourteenth Amendment" because it punishes the mere status of being a pauper. This argument is not, unlike his vagueness claim, applicable to the city ordinance. The ordinance does not punish being a pauper; a person without "a legitimate business or visible means of support" must also commit the act of loitering "in an idle, dissolute, disreputable or loafing way."

results in ambiguity as to whether certain kinds of conduct are covered by the statute. Assuming that this is true, this Court has held that "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague * * *. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *United States* v. *Harriss*, 347 U.S. 612, 618; accord, *United States* v. *Petrillo*, 332 U.S. 1, 7; *Robinson* v. *United States*, 324 U.S. 282, 285–286; *United States* v. *Wurzbach*, 280 U.S. 396, 399; cf. *Jordan* v. *De George*, 341 U.S. 223, 231. The ordinance involved here is plainly aimed at persons who, having no employment or legal source of income, remain on the streets without any valid reason for their presence.[11]

The defendants' conduct in this case was the kind of conduct at the heart of the ordinance no matter how narrowly it might be read. The defendants had been sitting in an automobile for five hours late at night. They all admitted that they were unemployed. They had no reasonable explanation for their presence. Therefore, whether or not other persons in other situations might be uncertain as to the lawfulness of their conduct under this ordinance, the ordinance clearly

[11] From an early time the night-walker or prowler has been a cause for concern. See 2 Hale, *Pleas of the Crown* (1st American ed., 1847) 96; 2 Hawkins, *Pleas of the Crown* (6th ed., 1777), c. 12, § 20; 4 Blackstone, Commentaries (Lewis ed., 1900) 292; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 704–705. It makes no difference that the defendants were apparently sitting in wait rather than walking.

covered the defendants' conduct and was constitutional as applied to them.

Moreover, the crime of vagrancy, with essentially the same elements as those in the ordinance involved here, is of ancient origin. Such laws appeared in crude form in Ireland in the fifth century and in England in the seventh century. Ribton-Turner, *A History of Vagrants and Vagrancy* (1887), 5, 374–375. Today, such laws exist in almost all Anglo-American jurisdictions. They have been repeatedly upheld by the courts against contentions that they were unconstitutionally vague. *E.g.*, *Adamson* v. *Hoblitzell*, 279 S.W. 2d 759 (Ky.); *Ex parte Strittmatter*, 58 Tex. Crim. Rep. 156, 124 S.W. 906; *City of Columbus* v. *McCrory*, 49 N.E. 2d 583 (Ohio); *Dominguez* v. *City and County of Denver*, 363 P. 2d 661 (Colo.); see *State* v. *Grenz*, 26 Wash. 2d 764, 175 P. 2d 633; 9 A.L.R. 1366; 111 A.L.R. 68.[11]

[11] Of the state and territorial cases cited by petitioner (Br. 35–36, note 25) holding vagrancy statutes unconstitutional only *Territory of Hawaii* v. *Anduha*, 31 Haw. 459, affirmed, 48 F. 2d 171 (C.A. 9), and *City of St. Louis* v. *Gloner*, 210 Mo. 502, 109 S.W. 30, involve provisions in any way analogous to that involved here. And in those cases the conduct involved did not, as here, occur late at night under circumstances indicating that those loitering were a danger to the public.

Petitioner also cites (Pet. Br. 36–37) *Lanzetta* v. *New Jersey*, 306 U.S. 451, and Mr. Justice Black's opinion dissenting on other grounds in *Edelman* v. *California*, 344 U.S. 357. In those cases, however, the statutes, while loosely grouped under the heading of vagrancy, were entirely different and more ambiguous than that in this case. They applied to any person "known to be a member of any gang" and a "dissolute person," respectively. Moreover, in *Lanzetta*, the Court made clear that it was dealing with "a new offense," not one existing for centuries. 306 U.S. at 453. See *id.* at 455.

In any event, this case does not involve the constitutionality of the Newport ordinance. The issue is whether the police acted arbitrarily. Surely, they are not acting arbitrarily in making an arrest when an offense is committed in the presence under an existing ordinance whether or not a court might later uphold its constitutionality. The police are ministerial officers rather than judicial officers; their job is not to expound statutes but to act under them. Cf. *Miller* v. *Stinnett*, 257 F. 2d 910 (C.A. 10).

Conceivably, an arrest would be invalid if it was based on a statute which was patently unconstitutional. In those circumstances, officers may perhaps fairly be charged with knowing that no offense was actually being committed in their presence. Here, however, even if the ordinance is vague in its outer contours, it appears to cover the very circumstances confronting the officers. Moreover, the ordinance is, at the least, not patently unconstitutional. Cf. Model Penal Code, § 250.6. As we have seen, it is the descendant of laws which have existed for centuries, and similar statutes have been repeatedly sustained. Indeed, the Kentucky Court of Appeals has held that the analogous state statute (see p. 17 above) is not void for vagueness. *Adamson* v. *Hoblitzell*, 279 S.W. 2d 759. When the highest court of the State has ruled that a similar vagrancy statute is not void for vagueness, it is not the function of the police to question that judgment.

2. The search was proper as incident to a valid arrest

It is well established that officers may, incident to a valid arrest, search the person arrested and the surrounding premises "to find and seize things connected with the crime," including instrumentalities of the crime, fruits of the crime, contraband, and weapons. *Agnello* v. *United States,* 269 U.S. 20, 30; accord, *e.g., Carroll* v. *United States,* 267 U.S. 132, 158; *Weeks* v. *United States,* 232 U.S. 383, 392. If the officers happen to find items related to another crime during such a search, they need not ignore them. *Harris* v. *United States,* 331 U.S. 145, 153–155.

The crime of vagrancy is closely related to other crimes and vagrancy statutes have been historically used to protect the community against persons whose only means of support was illegal. See 3 Wharton, *Criminal Law and Procedure* (Anderson ed.), § 956, p. 99. It is apparent that the Newport ordinance, like the state statute, is intended to prevent such persons from lying in wait on the city streets to commit such crimes as assault and robbery on passers-by. Assuming that the officers here did not have probable cause to believe that the defendants had committed any other crimes (but see pp. 29–34 below as to auto theft), they could reasonably suspect that the occupants of the car had committed, or were soon likely to commit, other crimes. The three men claimed that one of them had just bought an automobile although they admitted that they were unemployed and had no title papers. Furthermore, their unlikely and evasive explanation of their pres-

ence late at night while parked for five hours made it appear that they were lying in wait. We suggest, although the point is not free from doubt, that, having made a valid arrest for vagrancy, the officers could search for instrumentalities and fruits of closely related crimes, such as assault and robbery. This is not, of course, to argue that officers are free to conduct a general search whenever they make a valid arrest.[13]

It is irrelevant that the search was delayed fifteen minutes until the automobile had been moved to a garage near police headquarters. If the right to search the car existed at all, it included the right to search at a safe and suitable place. The criterion of reasonableness allows flexibility in procedures. Arresting officers with reason to suspect that an automobile has been stolen have the right to remove an automobile to the police station and search it in a sheltered, lighted area without the necessity of watching three men on the street late on a winter night.

This view is amply supported by decisions of this Court and the lower federal courts. In *Abel* v. *United States*, 362 U.S. 217, 239, this Court suggested that, if a search may be conducted at the place of arrest, it may be conducted at the first place of detention.[14] In *Fraker* v. *United States*, 294 F. 2d 859 (C.A. 9), a defendant arrested for robbery was booked

[13] While a search cannot be justified by what is found (see pp. 33–34 below), it is interesting that the automobile did in fact contain both weapons and instrumentalities of robbery.

[14] The defendant there had, however, chosen to take the property with him.

at the station and his car was taken to a nearby garage. A search of his automobile one hour and a half after his arrest was found to be reasonable. Accord, *Bartlett* v. *United States*, 232 F. 2d 135 (C.A. 5); *United States* v. *Fortier*, 207 F. Supp. 516 (D. Conn.); *State* v. *Mpetas*, 79 N.J. Super. 202, 191 A. 2d 186, 189; cf. *Scher* v. *United States*, 305 U.S. 251.[15]

Petitioner contends (Pet. Br. 49–51), that the officers had time to get a search warrant after they arrested the three defendants and therefore the search incident to the arrest was unreasonable. As he himself admits, *United States* v. *Rabinowitz*, 339 U.S. 56,

[15] *Weeks* v. *United States*, 232 U.S. 383, *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, and *Agnello* v. *United States*, 269 U.S. 20, which are relied upon by petitioner (Pet. Br. 48), are not in point as to this issue. In each of those cases the search was of a place not under the immediate control of the person arrested at the time of the arrest. We do not contend that when a person is arrested in his home a search can later be conducted of his office. Instead, our contention is that, if a person is arrested in his automobile, it can be moved and searched for purposes of convenience a few minutes later.

The court of appeals cases relied on by petitioner (Pet. Br. 51–52) are likewise inapposite. In *Rent* v. *United States*, 209 F. 2d 893 (C.A. 5), the search occurred more than nine hours after the arrest. While the search occurred only five minutes after the formal arrest in *United States* v. *Stoffey*, 279 F. 2d 924 (C.A. 7), the court of appeals emphasized that the defendant had been in the control of the police for three hours and that the defendant had not been arrested in his automobile. In *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5) certiorari denied, 349 U.S. 921, the time between the arrest and search is not stated. The search and seizure in *Weaver* v. *United States*, 295 F. 2d 360 (C.A. 5), was invalid on other grounds since the search immediately followed the arrest. In *Mosco* v. *United States*, 301 F. 2d 180 (C.A. 9), and *Clay* v. *United States*, 239 F. 2d 196 (C.A. 5), the searches preceded the arrests.

overruled the holding in *Trupiano* v. *United States*, 334 U.S. 699, that a search without a warrant which is incident to a valid arrest is invalid if the officers had time to obtain a search warrant. However, petitioner contends that, even under *Rabinowitz*, this is one factor to be considered in determining reasonableness. Even if petitioner's legal position is correct, the officers did not have time to obtain a warrant at the time the arrest was made. This was the crucial time since the officers had no right to move the automobile unless they could, contrary to petitioner's position, either seize or search it. Four officers made the arrest. Under petitioner's argument, one would have had to obtain a search warrant—assuming that one could have been obtained at 3:00 a.m.—leaving only one to guard the automobile and two officers to take the three arrested men to police headquarters. If the automobile had been left unattended, a possible confederate (one in fact existed) could have moved it. It was reasonable for the officers to refuse to divide up late at night and thereby to endanger themselves, the effectuation of the arrests, and the search of the automobile. Since the officers in *Rabinowitz*[10] could just as easily have obtained a search warrant, this Court's holding that the search without a warrant incident to that arrest was valid is controlling here.

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[10] Three government agents, accompanied by an Assistant United States Attorney and two other persons, made the arrest in *Rabinowitz*.

B. THE SEARCH WAS REASONABLE SINCE THE STATE OFFICERS HAD PROBABLE CAUSE TO ARREST THE DEFENDANTS FOR AUTOMOBILE THEFT AND TO SEIZE THE AUTOMOBILE AS THE FRUIT OF THE CRIME

1. The defendants' arrests were valid if the officers had probable cause to believe that they had committed automobile theft even though they were arrested for another crime

The defendants in this case were arrested and booked for "vagrancy." We submit that, even assuming that the officers could not properly have made the arrests for this crime, the arrests were still valid if the officers had probable cause to conclude that another crime had been committed. For it is clear that an arrest may be upheld on a theory which was not in the minds of the arresting officers.

This Court has held that, even if the warrant upon which an arrest is based is invalid, nevertheless the arrest is valid if the arresting officers had probable cause to believe that the suspect committed the offense charged in the warrant. *Stallings* v. *Splain*, 253 U.S. 339, 342; *United States* v. *Rabinowitz*, 339 U.S. 56, 60; cf. *Marron* v. *United States*, 275 U.S. 192. See also *United States* v. *Gowen*, 40 F. 2d 593, 595 (C.A. 2), reversed on other grounds *sub. nom. Go-Bart Importing Co.* v. *United States*, 282 U.S. 344; *United States* v. *Chin On*, 297 Fed. 531, 533 (D. Mass.). Moreover, in *United States* v. *Rabinowitz*, the Court indicated that, regardless of whether the arrest warrant was sufficient, an arrest was valid if the arresting officers had probable cause to believe that the suspect had committed an offense in their presence, even though that offense was not the same as that charged in the

warrant. After the Court first stated that the warrant was, as far "as can be ascertained, broad enough to cover the crime of possession" of forged and altered postage stamps, it went on to say that, even if the warrant did not cover that offense, "the arrest therefor was valid because the officers had probable cause to believe that [this] felony was being committed in their very presence." 339 U.S. at 60."

Under the principle stated in *Rabinowitz*, the arrests of the three defendants were valid if the arresting officers had, at that time, information establishing probable cause in relation to another crime, even though they in fact intended to arrest the defendants for vagrancy. Lawyers and even judges have difficulty in applying the general standards of probable cause to specific fact situations. It is therefore not surprising that police officers sometimes make mistakes when, impelled by the need to act, they are forced to decide quickly whether they have probable cause. When it is later found by a court that they made a mistake because they did not in fact have probable cause, the arrest is properly held to be illegal. On the other hand, when the arresting officers in fact had probable cause to conclude that one crime had been committed, it would make little sense to hold that the arrest is illegal because they had a different offense in mind. Just as a subjective, good-faith belief of the arresting officers that probable cause exists cannot justify an arrest when there is no objective

[17] Later decisions of this Court have questioned *Rabinowitz* (see Pet. Br. 24), but entirely on other grounds.

probable cause, the subjective belief of the arresting officers that they are arresting for one offense rather than another cannot vitiate an arrest when objectively they had probable cause to conclude that the suspects had committed a crime. To hold otherwise would not protect anyone from arrest on mere suspicion—the interest which the Fourth Amendment was designed to protect. It would merely penalize the government—in reality the public—when arresting officers, having several possible grounds on which to arrest a suspect, happen to choose an invalid rather than a valid ground.

2. The arresting officers in fact had probable cause to conclude that the defendants had committed the felony of automobile theft

Kentucky law provides that "[a]ny person who unlawfully takes, drives or operates a vehicle without the knowledge or consent of the owner" is guilty of a felony. 1953 Ky. Rev. Stat. § 433.220. This Court has held that "[p]robable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Draper* v. *United States*, 358 U.S. 307, 313. Earlier, this Court held in *Brinegar* v. *United States*, 338 U.S. 160, 175–176, that:

> In dealing with probable cause * * *, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life

> on which reasonable and prudent men, not legal technicians, act. * * *
>
> * * * Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

The government submits that the arresting officers had, under this criterion, a reasonable basis for believing that the defendants had probably taken the automobile in which they were sitting without the consent of the owner.

Four officers of the Newport police force, responding to a complaint, went at 3 a.m. to investigate three men who had been seated in an automobile in the business district for five hours on a winter night. There is no valid basis to contest, and petitioner does not deny, the right of the officers to question the occupants of the automobile. See, *e.g.*, *Rios* v. *United States*, 364 U.S. 253; *Busby* v. *United States*, 296 F. 2d 328, 331 (C.A. 9); *Gisske* v. *Sanders*, 9 Cal. App. 13, 16–17, 98 Pac. 43; *People* v. *Simon*, 45 Cal. 2d 645, 290 P. 2d 531; *People* v. *West*, 144 Cal. App. 2d 214, 300 P. 2d 729. The officers sought to ascertain the reason for this unusual conduct. The answers of the men were at first vague and evasive. After some hesitation, Sykes, the driver, claimed that they were waiting for a truck driver, Johnny Sexton, but Sykes was unable to state how he was going to recognize the truck or how the driver would be able to recognize the automobile. The men could not name

the company for which Sexton worked, the kind of truck he was driving, or the expected time of his arrival. There was no reason given why they had waited so long for a truck supposedly being driven from Lexington to Newport, a distance of less than 100 miles.

When the officers inquired as to the ownership of the Buick automobile, Sykes said that he had bought the car the previous day. However, Sykes did not have any papers evidencing ownership, although Kentucky law requires that a car must be registered before it can be operated and a registration receipt must be kept in the owner's possession at all times. Ky. Rev. Stat. §§ 186.020, 186.170. The officers inquired how the truck driver would recognize a newly purchased automobile. Sykes answered that the truck driver usually stopped for coffee at a restaurant at the next corner; he could not explain, however, why the men were parked some distance from the restaurant. The three men told the officers that they were unemployed, one saying that he had been unemployed for six months.

In summary, the officers could have reasonably suspected that the three men were engaged in some illegal activity by their mere presence for five hours in a parked car from 10 p.m. to 3 a.m. The men gave highly suspicious reasons for their presence. The officers then questioned them about their ownership of the automobile. The story of Sykes that he had purchased the automobile the day before seemed highly unlikely since, contrary to Kentucky law, he had no registration papers and, like the other two men, he admitted to being unemployed. The officers could

have reasonably doubted the probability that an unemployed man would have either the cash or credit to buy an automobile apparently worth over five hundred dollars."[18] In these circumstances, and considering the evasiveness of the defendants' proffered explanations of their conduct, we submit that "a man of reasonable caution" was warranted in believing that the three occupants of the automobile had stolen it.

It is worth speculating as to what the officers should have done rather than arrest the three defendants. For this Court has made clear that the practical situation confronting law enforcement officers is important in determining whether the standard of probable cause has been met in the circumstances. In *Brinegar*, Mr. Justice Rutledge, speaking for the Court, said (338 U.S. at 176):

> These long-prevailing standards [of probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. * * * The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

[18] The National Auto Dealers Used Car Guide valued a 1955 Buick Hardtop as worth between $525 and $590 at retail in 1961 depending on the model.

Here, the officers had responded to a complaint of a citizen; they were not making a hit or miss round-up of either pedestrians or motorists on "suspicion." The officers had very strong reasons for believing that the three occupants of the automobile had engaged in auto theft and were about to engage in further crimes. As experienced police officers, they were aware of the fact that the automobile is not just a means of innocent transportation but that it is, especially if stolen, an important tool for the commission of other crimes. The occupants had sat in an automobile for five hours late at night seemingly in wait. They gave the officers an explanation of their presence which was evasive and improbable. As the Court of Appeals for the District of Columbia Circuit posed the issue in similar circumstances in *Bell* v. *United States*, 254 F. 2d 82, 87, certiorari denied, 358 U.S. 885.

> What should the patrolman have done? Forthwith gesture these men on? Or detain them for further inquiry—for investigation of the obviously reasonable suspicion? Clearly his duty required the latter.

As it turned out, the automobile was not stolen. Sykes had in fact purchased it for a total price of $341.25 the day before (R. 118). On the other hand, Sykes testified that the men were waiting for the former husband of Sykes' wife to come out of a night club so that they could whip him (R. 183–184); by his account, they therefore were guilty of conspiracy to commit assault. In addition, the conviction in this case shows that the three men were also guilty of con-

spiring to rob a federally insured bank. Thus, the men were not guilty of auto theft but were were guilty of two other crimes. It is well established that an arrest cannot be justified because it later turns out that the suspects had committed a crime when the officers did not have probable cause at the time of the arrest. *E.g., Henry* v. *United States,* 361 U.S. 98, 103; *Johnson* v. *United States,* 333 U.S. 10, 16–17. By the same token, it is immaterial that the suspect is later found not to have committed a crime when the officers had probable cause to believe he had at the time they made the arrest. *Dumbra* v. *United States,* 268 U.S. 435, 441.

In short, the question is whether the officers had probable cause to believe, at the time of the arrests, that the three occupants of the automobile had committed auto theft. It is irrelevant that evidence subsequently obtained shows that, instead, they were guilty of other crimes. As this Court made clear in *Brinegar,* the standard relates to probabilities; it leaves room for mistakes so long as they are reasonable. Since the officers did have probable cause as to auto theft, the arrests of the three defendants were valid.

3. Incident to the arrest, the officers could seize and search the automobile as the fruit of the crime

We have argued above that the arrests of the three occupants of the automobile were valid. It is well established that, incident to a valid arrest, law enforcement officers may seize "the fruits of crime such as stolen property." *Harris* v. *United States,*

331 U.S. 145, 154; accord, *Agnello* v. *United States*, 269 U.S. 20, 30; *Carroll* v. *United States*, 267 U.S. 132, 158; *Gouled* v. *United States*, 255 U.S. 298, 309; *Weeks* v. *United States*, 232 U.S. 383, 392; *Boyd* v. *United States*, 116 U.S. 616, 623–624. After seizure, property can be moved, inventoried, and thoroughly examined at any time in preparation for use at trial or return to the proper owner. See *United States* v. *Lee*, 274 U.S. 559, 562.

Having probable cause to arrest the three men for auto theft, the officers could likewise reasonably believe that the automobile in which the occupants were sitting was the fruit of the crime of auto theft. Consequently, the automobile and all that was in it were subject to seizure as stolen property [19] and to being moved to the garage near police headquarters. It is immaterial, from this standpoint, that the automobile was searched some minutes after the arrests, for at that time there was still reason to believe that the automobile had been stolen. The weapons, masks, false license plates, and other paraphernalia of robbery discovered in the automobile could be seized and retained beyond the time the automobile itself was found not to have been stolen since they were instrumentalities of the crime of robbery and are therefore subject to seizure. See *Harris* v. *United*

[19] Several States have statutes which specifically authorize officers to seize an automobile when the officers have reasonable cause to believe that the vehicle is not in the rightful possession of the owner. See, *e.g.*, Colo. Rev. Stat. § 13–2–17. N.Y. Vehicle and Traffic Law, § 424.3; Utah Code § 41–1–115; Wyo. Stat. § 31–322.

States, 331 U.S. 145, 153–155. In short, if the officers had probable cause to arrest for auto theft, it surely follows that the search of the automobile and seizure of the items found in it were likewise valid.

C. INDEPENDENT OF THE ARRESTS, THE OFFICERS COULD PROPERLY SEARCH AND SEIZE THE AUTOMOBILE BECAUSE THEY HAD PROBABLE CAUSE TO BELIEVE THAT IT HAD BEEN STOLEN

We have urged above that the arrests of the three occupants of the automobile were lawful because the officers had probable cause to arrest for auto theft, and that therefore the search and seizure of the automobile incident to the arrests were valid. This argument turned basically on the validity of the arrests. Here, we contend that, independent of the validity of the arrests, the officers had probable cause to believe the automobile was stolen (see pp. 29–34 above) and could therefore search and/or seize it under principles laid down by this Court.

1. The officers could search the automobile since they had probable cause to believe that it had been stolen

In *Carroll* v. *United States*, 267 U.S. 132, this Court held that officers may search an automobile without a warrant and without previously making an arrest, when they have probable cause to believe that it contains contraband such as stolen goods. Accord, *Husty* v. *United States*, 282 U.S. 694; *Scher* v. *United States*, 305 U.S. 251; *Brinegar* v. *United States*, 338 U.S. 160; *Henry* v. *United States*, 361 U.S. 98. It follows that an automobile can likewise be searched when it itself is subject to seizure because it is reasonably believed to have been stolen.

In dictum, the Court has suggested that *Carroll* left undecided whether the principle extended beyond a

search for violation of the National Prohibition Act. *United States* v. *Di Re*, 332 U.S. 581, 584–585. The Court in *Di Re* noted that the legislative history of the Act showed that Congress intended to provide for searches without warrants and that this statute was entitled to a strong presumption of constitutionality. We submit that the *Carroll* decision applies wherever officers have probable cause to believe that the automobile is carrying contraband or that it, itself, is subject to seizure, as when it is stolen. First, the language of the holding in *Carroll* is not confined to searches under the National Prohibition Act. Instead, the Court clearly stated that "[o]n reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid," 267 U.S. at 149; see *id.* at 153. Thus, the Court did not rely on the statute or offense involved; rather, its decision turned on the object to be searched. Since in this case, as in *Carroll*, an automobile was involved, we believe that here too the officers could search on the basis of probable cause.

Second, this Court has applied the holding of *Carroll* beyond cases involving the National Prohibition Act. In *Scher* v. *United States*, *supra*, and *Brinegar* v. *United States*, *supra*, the latter decided after *Di Re*, the Court relied on *Carroll* to uphold searches made under the Liquor Taxing Act of 1934 and the Liquor Enforcement Act of 1936. And only a few

terms ago in *Henry* v. *United States, supra,* the Court again made clear that *Carroll* was applicable to searches for contraband liquor. While all of these cases concerned liquor, the statutes involved were not the National Prohibition Act. Yet, this Court applied *Carroll* without even suggesting that the difference in the statutes or offenses involved was relevant.

There are only two possible distinctions between this case and *Carroll*. First, the automobile searched in this case had admittedly been stationary for five hours. However, in *Scher* v. *United States, supra,* the principle laid down in *Carroll* was applied to the search of an automobile which had been parked in the suspect's garage immediately before the officers arrived. See *Husty* v. *United States, supra,* 282 U.S. at 701; *United States* v. *Walker,* 307 F. 2d 250, 252 (C.A. 4). The automobile here, like any other automobile in working order, was capable of immediate movement. The officers could not be certain whether it would move in seconds or hours. The officers did not have probable cause to believe that it had been stolen until after they had questioned the occupants (see pp. 30–31 above. Once the officers' suspicions were known to the occupants, it was likely that they would drive out of the area or even beyond the jurisdiction before a search warrant could be obtained.[20]

[20] Petitioner states (Pet. Br. 43) that the automobile could not have been moved because it was in the custody of the police. However, this custody was legal only if, as we argue and petitioner denies, the officers could either seize the automobile or could at least move it to a convenient place for search.

Second, the search of the automobile was not made until the automobile was first moved to a garage near police headquarters. As we have argued (pp. 24–25), if a search of an automobile could properly be made on the street, it may be delayed a few minutes and moved a few blocks for purposes of convenience. Such a search does not thereby become unreasonable under the Fourth Amendment.

2. The officers could properly seize, and subsequently search, the automobile because they had probable cause to believe that it had been stolen

It is not necessary, however, to go so far as *Carroll* went in order to sustain the searches in this case. We have seen (pp. 29–34) that the officers had probable cause to believe that the automobile had been stolen. They had reasonable ground to believe that they could seize it as stolen from its proper owner; there was no need to search an automobile which was not itself contraband while looking for contraband. As this Court stated in *Boyd* v. *United States*, 116 U.S. 616, 623, "[t]he seizure of stolen goods is authorized by the common law." The reason is that the thieves have no right to such goods since "the owner from whom they were stolen is entitled to their possession * * *." *Id.* at 624.[21] Once the automobile was properly seized as stolen property, it could be moved, inventoried, and searched.

[21] See also the cases cited above (pp. 34–35), holding that stolen goods may be searched for, and seized, incident to a valid arrest.

II

THE APPOINTMENT OF TWO LAWYERS TO REPRESENT THE THREE DEFENDANTS JOINTLY WAS NOT PLAIN ERROR WARRANTING REVERSAL WHEN RAISED FOR THE FIRST TIME IN THE BRIEF ON THE MERITS IN THIS COURT

Petitioner also contends (Pet. Br. 54–57), relying on *Glasser* v. *United States*, 315 U.S. 60, that the appointment of two lawyers to represent the three defendants jointly deprived him of the effective assistance of counsel. This issue is not properly here since it was not raised in either of the two courts below and was not presented in the petition for a writ of certiorari. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362, note 16; *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 96, note 1; *Irvine* v. *California*, 347 U.S. 128, 129–130 (plurality opinion of Mr. Justice Jackson); Rule 23(1)(c) of the Rules of this Court. Therefore, petitioner is required to show not merely that the district court committed error or even prejudicial error. Instead, petitioner is required to show "exceptional circumstances" requiring this Court to rectify a "plain error" or error which "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160; accord, *e.g.*, *Silber* v. *United States*, 370 U.S. 717; *Duignan* v. *United States*, 274 U.S. 195, 200; Rule 40(1)(d)(2) of the Rules of this Court.

In any event, the district court did not err in appointing two attorneys to represent the three defendants. First, in *Glasser* this Court emphasized that counsel for Glasser had objected to his appoint-

ment by the trial court to represent an additional defendant because of the possibility of conflict between the interests of the two defendants. 315 U.S. at 68, 70, 71. Thus, the Court made clear that the appointment of counsel for co-defendants is erroneous only when one or both defendants is unwilling to be so represented. In this case, there is not even a suggestion in the record that petitioner did not wish to be represented jointly or that his lawyers felt they could not properly represent the co-defendants.

Second, this Court also made clear in *Glasser* that convictions may not be reversed because the trial court appointed counsel to represent defendants jointly unless some prejudice to the defendants is shown. For the Court, while reversing Glasser's conviction, refused to reverse Kretske's although both were represented by the same attorney. 315 U.S. at 77. The Court could not presume prejudice since there is nothing inherently undesirable in having one lawyer represent two defendants. In every joint trial there are considerations in favor of, and against, both joint and individual representation. The choice depends upon trial strategy and the relationship between the defendants. For example, the chances of an acquittal may be greater where one lawyer pursues a common defense strategy than where separate lawyers pursue different tactics. On the other hand, if defendants have conflicting interests, joint counsel might result in one defendant's separate argument not being presented.

Petitioner suggests (Pet. Br. 55–56) that, if he had had separate counsel, he might have tried to under-

mine co-defendant Sykes' defense and might have attacked his credibility. More specifically, he claims that his counsel might have emphasized Sykes' confession which did not implicate petitioner, attacked Sykes' credibility in general, and attempted to prove that Sykes put the incriminating materials in the automobile. But it is likely that counsel for Sykes would have counterattacked and assailed petitioner's credibility and defense. Under such circumstances, it is not inconceivable that Sykes might have testified against petitioner. Thus, there are reasons why petitioner might have preferred to have joint counsel with his co-defendants in order to present a consistent, unified defense. In these circumstances, in the absence of any objection, there is no basis for concluding that petitioner was prejudiced by the trial court's action. Never having raised the point, petitioner cannot now claim that he would have fared better if he had had separate counsel and attacked his co-defendants.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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